1994

Merit Electrical & Instrumentation, a corporation, and Jonathan Carl Juretich, Christopher M. Schiffman, Dan A. Johnson, and Kit Vaness v. Utah Department of Commerce, Division of Occupational and Professional Licensing: Petitioner's Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and JONATHAN CARL JURETICH, CHRISTOPHER M. SCHIFFMAN, DAN A. JOHNSON, and KIT VANESS, Respondents below and Petitioners on appeal, vs. UTAH DEPARTMENT OF COMMERCE, DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING, Respondent on appeal.	**PETITIONERS' REPLY BRIEF** Citation Nos. 1846, 1841, 1917, 1918 and 1842 (Consolidated) COURT OF APPEALS # 940435-CA PRIORITY 14

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ROBERT K. HUNT (5772)
Assistant Attorney General
Consumer Rights Division
JAN GRAHAM (1231)
Utah Attorney General
330 South 300 East
Salt Lake City, UT 84111
Telephone (801) 575-1600
Attorneys for Respondent

JAMES B. LEE (1919)
BARBARA K. POLICH (2620)
WILLIAM J. STILLING (6339)
PARSONS BEHLE & LATIMER
201 S. Main Street #1800
P.O. Box 45898
Salt Lake City, Ut 84145-0898
Telephone (801) 532-1234
Attorneys for Petitioners

IN THE UTAH COURT OF APPEALS

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MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and JONATHAN CARL JURETICH, CHRISTOPHER M. SCHIFFMAN, DAN A. JOHNSON, and KIT VANESS, Respondents below and Petitioners on appeal, **vs.** UTAH DEPARTMENT OF COMMERCE, DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING, Respondent on appeal.	**PETITIONERS' REPLY BRIEF** Citation Nos. 1846, 1841, 1917, 1918 and 1842 (Consolidated) COURT OF APPEALS # 940435-CA PRIORITY 14

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ROBERT K. HUNT (5772)
Assistant Attorney General
Consumer Rights Division
JAN GRAHAM (1231)
Utah Attorney General
330 South 300 East
Salt Lake City, UT 84111
Telephone (801) 575-1600
Attorneys for Respondent

JAMES B. LEE (1919)
BARBARA K. POLICH (2620)
WILLIAM J. STILLING (6339)
PARSONS BEHLE & LATIMER
201 S. Main Street #1800
P.O. Box 45898
Salt Lake City, Ut 84145-0898
Telephone (801) 532-1234
Attorneys for Petitioners

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INTRODUCTION

Contrary to Respondent's assertion, Petitioners have not asked this Court to create an exception to the jurisdictional requirement for finality. Rather, Petitioners ask this Court to interpret the term "final" in a manner that is fair as well as consistent with case law and governing statutes. Like federal courts, this Court can adopt the Collateral Order Doctrine as a practical construction of the finality requirement in order to adjudicate claims that finally determine an important issue, separate from the merits of the case and that are effectively unreviewable on appeal. Unlike parties to a trial, who can seek a discretionary appeal for such claims under Rule 5 of the Utah Rules of Appellate Procedure, parties to this administrative hearing have no avenue for seeking a discretionary appeal. As a result, Petitioners will forever lose the opportunity to preserve their statutory and constitutional rights unless this Court reviews the substantive claims in the Petition for Review.

Despite this Court's Order for plenary presentation of the case and full briefing of the issues involved therein, Respondent has merely briefed the jurisdictional issue raised by the Court's Motion for Summary Disposition. Petitioners, therefore, request this Court to vacate the Order Converting the Citations to a Formal Adjudicative Proceeding once the Court resolves the jurisdictional issue.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE COLLATERAL ORDER DOCTRINE AS AN EQUITABLE CONSTRUCTION OF THE FINALITY REQUIREMENT.

A. Applying the Collateral Order Doctrine is a Matter of Statutory Construction.

Respondent correctly asserts that this Court's jurisdiction arises from Utah Code Ann. §§ 78-2a-3(2) and 63-46b-16(1), which only permit review of "final" agency orders. However, Respondent incorrectly concludes that this Court has no authority to interpret the term "final." It is axiomatic that a court has authority to interpret the statute which defines its own jurisdiction and Petitioners merely ask this Court to do so here.

Contrary to Respondent's assertions otherwise, the Collateral Order Doctrine is nothing more than an interpretation of the statutory term "final." Adopting the Collateral Order Doctrine is therefore well within the purview of this Court. For almost fifty years, federal courts have applied the Doctrine as a "practical rather than a technical construction" of the finality requirement. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221 (1949). The Cohen Court recognized that a rigid, inflexible definition deprives a party the opportunity to adjudicate claims that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen, 337 U.S. at 546. Therefore, a decision that conclusively

resolves an important issue which is completely separate from the merits of the underlying action and which is effectively unreviewable on appeal is considered final for purposes of federal appellate review. Nixon v. Fitzgerald, 457 U.S. 731, 742, 102 S.Ct. 2690 (1982).

Utah courts should adopt the Collateral Order Doctrine because they have consistently interpreted the finality requirement to mean the same thing as federal courts. In Cohen, the United States Supreme Court recognized that 28 U.S.C. § 1291 permitted appeals only from "final decisions of the district courts." Cohen, 337 U.S. at 546. As a matter of statutory interpretation, the Court construed the "final decision" requirement to preclude appellate review "[s]o long as the matter remains open, unfinished or inconclusive." Id. Utah appellate courts have similarly interpreted the use of "final" under the Utah Administrative Procedures Act ("UAPA"). In Sloan v. Board of Review, 781 P.2d 463 (Utah Ct. App. 1989), this Court determined that "an order of [an] administrative agency is not final so long as it reserves something for the agency for further decision." Id. at 464; see also Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542, 544 (Utah Ct. App. 1992). Since the United States Supreme Court crafted the Collateral Order Doctrine under a definition of "final" virtually identical to that articulated in Sloan and Barney, this

Court's adoption of the Doctrine would be entirely consistent with Utah precedents as a practical and fair construction of that term.

Respondent argues that this Court is constrained to apply a rigid, technical interpretation to UAPA's finality requirement. Petitioners, on the other hand, offer a practical and fair construction, which federal courts have long used to resolve important issues that would otherwise be unreviewable on appeal. Unless this Court adopts the Collateral Order Doctrine, Petitioners will be forced to adjudicate their citations in the wrong forum and the Division will be permitted to violate its own rules unchecked. Most importantly, once Petitioners are forced through the unlawful procedure, they will have suffered the harm they now seek to avoid. Accordingly, Petitioners ask the Court to take this opportunity to adopt a fair and practical construction of the finality requirement and to consider favorably the Petition for Review.

B. Justice Requires Application of the Doctrine in the Absence of any Alternative Route for Review.

Administrative agency proceedings require application of the Collateral Order Doctrine because, unlike trial proceedings, parties cannot petition for discretionary appellate review of

issues affecting important rights. See Utah R. App. P. 5 & 18.[1] Rule 5 of the Utah Rules of Appellate Procedures permits parties the "opportunity to convince an appellate court that the issue raised is so important that review prior to full adjudication of the case is justified or that the order will escape review altogether if an appeal is not allowed." Tyler v. Department of Human Services, 874 P.2d 119, 120 (Utah 1994). Yet, Rule 18 deprives Petitioners of that opportunity in their administrative proceeding. The absence of any chance for review begs for a practical construction of the finality requirement and for application of the Collateral Order Doctrine.

Utah appellate courts have not yet had an opportunity to apply the Collateral Order Doctrine in a case where petitioners have no access to a discretionary appeal. In Tyler v. Department of Human Services, 874 P.2d 119 (Utah 1994), the Utah Supreme

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[1] These rules read in pertinent part as follows:

Rule 5. Discretionary appeals from interlocutory orders.

(a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. . . .

Rule 18. Applicability of other rules to review.

All provisions of these rules are applicable to review of decisions or orders of agencies, except that Rules 3 through 8 are not applicable. . . .

Court declined adopting the Collateral Order Doctrine in order to review a district court discovery order.[2] The Court considered the Doctrine, but ultimately rejected application in that case because the "defendants had an avenue to appeal [the] interlocutory order under rule 5 of the Utah Rules of Appellate Procedure, which they chose not to pursue." Id. at 120.

In contrast to Tyler, absent the Collateral Order Doctrine, Petitioners in this case have no opportunity to convince a court that important issues, which are unreviewable later, should be addressed. Essentially, Rule 18 of the Utah Rules of Appellate Procedure deprives Petitioners of this opportunity, which the Collateral Order Doctrine is intended to provide. It is patently unfair to afford parties in trial proceedings a chance to seek review of decisions that irreparably harm their rights, while precluding the same opportunity for parties to an administrative proceedings.

Petitioners seek an opportunity to convince this Court that the Division has violated its own rules by placing them in a

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[2] Not only did the State argue for adoption of the Collateral Order Doctrine in Tyler, see Defendant's Memorandum in Opposition to Motion for Summary Disposition in Tyler v. Department of Human Services at Addendum A, but the Court in Tyler noted that "the state has urged this court to adopt the federal collateral order doctrine in several other cases filed this term." Tyler 874 P.2d at 119. Respondent's contention that the Petition for Review is "frivolous," therefore, is without merit in light of the Attorney General's attempts in previous cases to obtain appellate review of orders on the same basis as Petitioners in this case, namely by way of the Collateral Order Doctrine. Indeed, Respondent asserts in its brief that the Collateral Order Doctrine still has a place in Utah jurisprudence. See Brief of Respondents at 10 n.2.

procedural track that deprives them of important statutory and constitution rights. Without appellate review at this stage of the proceedings, their ability to do so will be forever lost. In the interest of fairness, Petitioners respectfully request this Court to adopt the Collateral Order Doctrine.

II. THE PETITION FOR REVIEW IS APPROPRIATELY BEFORE THIS COURT BECAUSE IT ARISES OUT OF A FORMAL ADJUDICATION.

Respondent mischaracterizes the subject matter of the Petition for Review as arising from an informal adjudication. The Division converted the proceedings to a formal adjudication and now denies that disputes between the parties arise from a formal proceeding. Respondent cannot have it both ways.

Petitioners seek review of two orders: (i) the Order Converting the Citations to Formal Adjudicative Proceedings, dated April 8, 1994, and (ii) the Department of Commerce Order on Review, dated June 27, 1994, by which the Department refused to consider Petitioners' request that it vacate the Conversion Order. See Petitioners' Brief at n.1. The latter order arises out of Petitioners' efforts to seek reversal of the Conversion Order after conversion occurred. Although the arguments in the Petitioners' brief center on the Conversion Order, the Petition for Review technically arises from the Department's Order on Review. Clearly, the Department issued its Order after the citation proceedings had been converted to a formal adjudication

and this Court has jurisdiction to consider whether the Department incorrectly refused to vacate the Conversion Order.

Even if the Conversion Order was the only matter before this Court, the Court would still have jurisdiction because, as of the time the Conversion Order came into existence, these proceedings became formal. Respondent points to no other point in time when the informal proceedings ceased and the formal ones began. Surely, Respondent is not purporting that the proceedings have not yet become formal. In fact, prior to this Petition for Review, the parties had scheduled and begun discovery under the statutes governing formal proceedings. The formal adjudication came into existence the instant the Conversion Order did, and this Court, consequently, has jurisdiction to review that Order.

III. IF THIS COURT DETERMINES THAT THIS CASE ARISES FROM AN INFORMAL ADJUDICATION, TRANSFER TO DISTRICT COURT IS PROPER.

If the Court decides that the Petition for Review arises from an informal adjudication, and, that petition to the Court of Appeals is improper, the correct disposition of the case is transfer, not dismissal. Rule 44 of the Utah Rules of Appellate Procedure provides that if a petition for review is filed in a court without jurisdiction "the appellate court . . . shall transfer the case . . . to the court with appellate jurisdiction in the case." Accordingly, since Utah Code Ann. § 63-46b-15 grants the district court appellate jurisdiction over final

orders from informal administrative proceedings, transfer to the district court would be proper upon a finding that the Conversion Order arose from an informal adjudication.

CONCLUSION

This Court has appellate jurisdiction over the Petition for Review because the contested Orders arose out of a formal proceeding. Moreover, this Court has authority to adopt the Collateral Order Doctrine as a practical and fair construction of the finality requirement for jurisdiction. Indeed, the peculiar scheme that prohibits parties from seeking discretionary appeals of interlocutory administrative orders begs for the application of the Doctrine as a matter of fairness. Petitioners, therefore, respectfully request this Court to: (i) adopt the Collateral Order Doctrine, (ii) address the substantive issues contained in Petitioners' Brief, and (iii) vacate the Conversion Order.

DATED this 6th day of March, 1995.

PARSONS BEHLE & LATIMER

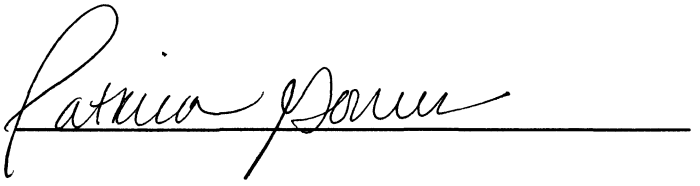
Barbara K Polich

James B. Lee
Barbara K. Polich
William J. Stilling
Of and For
PARSONS BEHLE AND LATIMER
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of March, 1995, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **Petitioners' Reply Brief**, to:

Robert K. Hunt
Utah Assistant Attorney General
Consumer Rights Division
230 South 300 East
Salt Lake City, Utah 84111



Tab A

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CLERK SUPREME COURT, UTAH

JAN GRAHAM - 1231
Attorney General
ELIZABETH KING - 4863
Assistant Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1650

Attorneys for Defendant/Appellant

IN THE UTAH SUPREME COURT

JAN L. TYLER,	:	
Plaintiff and Appellee,	:	**MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY DISPOSITION**
v.	:	**Subject to Assignment to the Court of Appeals**
DEPARTMENT OF HUMAN SERVICES, NORMAN G. ANGUS, and CHARLES F. LARSEN,	:	Case No. 930428
Defendants and Appellants.	:	

Defendants/Appellants, the State of Utah, Utah Department of Human Services, Norman G. Angus and Charles F. Larsen, submit the following Memorandum in Opposition to Plaintiff's Motion for Summary Disposition pursuant to Rule 10(c) Utah Rules of Appellate Procedure.

ARGUMENT

Plaintiff has alleged this court lacks jurisdiction to hear this appeal as there is no final order. Defendants concede there is no order of determination of final judgment in this case; nor should there be. This case is before the appellate court based on a direct appeal as of right in accordance with the

collateral order doctrine, a recognized exception to the finality rule.

Utah courts have never addressed the issue of whether the collateral order doctrine forms a basis for an appeal as of right of a non-final order. Defendants argue the court should extend existing law, apply the collateral order doctrine to the facts of this case, and grant defendants a right to appeal the trial court's order in this case. (The Order is attached as Exhibit A; the Defendant's Docketing Statement is attached as Exhibit B.)

For over forty years, courts have recognized a party's right to appeal an interlocutory order of a lower court under the collateral order doctrine described in Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1941). For Cohen's collateral order doctrine to apply, the lower court's order must: (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1988).[1]

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[1]In 15A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 3911 at 347 (1992), the commentator's note that the "Supreme Court's decisions establish the general contours of collateral order doctrine, even as they permit one element or another to be subordinated." They point out that the three-part test in Coopers & Lybrand "is no more than a useful starting point for analysis," id. at 351 and that "'as with so many multi-pronged legal tests it manages to be at once redundant, incomplete and unclear,'" id. (quoting Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986), cert. denied, 481 U.S. 1049, 95 L. Ed. 2d 836, 107 S. Ct. 2180 (1987)).

A lower court's order is deemed to have conclusively determined the disputed question if the order is "made with the expectation that it will be the final word on the subject addressed." Gulf Stream Aerospace v. Mayacamas Corp., 485 U.S. 271, 277, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988). The trial court's order of July 16, 1993 represents the final word on defendant's obligation to provide exhaustive answers to discovery requests despite conflicting language in the Government Records Access and Management Act (GRAMA) and in Rule 26, Utah Rules of Civil Procedure.

The trial court's order also resolves an important issue completely separate from the merits of the action. The collateral order doctrine requires that the issue be important in a jurisprudential sense. Nemours Foundation v. Manganaro Corp., New England, 878 F.2d 98, 100 (3rd Cir. 1989). See also Nixon v. Fitzgerald, 457 U.S. 731, 742, 73 L. Ed. 2d 349, 102 S. Ct. 2690 (1987) (collateral appeal of interlocutory order must present a serious and unsettled question). Given the confusion created by GRAMA with regard to the production of documents in discovery, an issue which affects a large number of parties and non-parties, and given the numbers of cases which involve the same facts and problems, this court should review the conflicting methodology and resolve the issue. Thus, the question is important in a jurisprudential sense.

Moreover, the issue of production of discovery is separate from the merits as it is not "enmeshed in the factual

and legal issues comprising the plaintiff's cause of action." Coopers & Lybrand, 437 U.S. at 469. In examining the propriety of the trial court's order, this court need not reach the underlying factual and legal issues regarding plaintiff's Whistle-blower action, her claim for breach of contract, or her allegation of sex discrimination.

Finally, the trial court's order is effectively unreviewable on appeal. If this court were to wait to resolve this issue on direct appeal after a determination on the merits, as plaintiff would have it, and if the court were then to determine that the trial court improperly applied GRAMA and Rule 26 to compel discovery, the defendants would have permanently lost the opportunity to resolve the collateral discovery issues administratively without simultaneously defending this litigation in the trial court. Cf. Mitchell v. Forsyth, 472 U.S. 511, 526-27, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). Thus, the defendants have asserted a right which would be destroyed if not vindicated before trial on the merits. United States v. MacDonald, 435 U.S. 850, 860, 56 L. Ed. 2d 18, 98 S. Ct. 1547 (1978).

While it has been argued that exceptions to the final judgment rule are unwarranted and "rise like Athena from the head of Zeus," United States v. Taylor, 798 F.2d 1337, 1338 (10th Cir. 1986), practical application of the doctrine is consistently encouraged.

> In our view, the Cohen court asserted the need for the practical application of [the

> collateral order doctrine] particularly in situations where it is clearly urgent that an important issue . . . be decided. Thus, in the unique instance where the issue is not 'collateral' but justice may require immediate review, a balancing approach should be followed to make this jurisdictional decision. The circumstances of the instant case require the application of such a balancing test rather than the mechanical analysis of the collateral order exception. **The critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.**

Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir. 1984), emphasis added.

Thus, even though defendants attempt an appeal of a "mere discovery motion," defendant's claims involve substantial issues with broad-based concerns which should be subject to interlocutory appeal under the Cohen exception. Cf. United States v. Deffenbaugh Industries Inc., 957 F.2d 749, 755 (10th Cir. 1992) (reviewing a discovery motion on appeal per the collateral order exception to the finality rule).

CONCLUSION

Interlocutory review of this matter by either appellate court based on the collateral order doctrine will prevent the unnecessary prolongation of a useless and expensive response to overbroad discovery requests and will resolve important issues collateral to the merits in this case.

RESPECTFULLY SUBMITTED this 7th day of October, 1993.

JAN GRAHAM
Attorney General

Elizabeth King

ELIZABETH KING
Assistant Attorney General
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY DEPOSITION**, this 7th day of October, 1993, to the following:

Elizabeth T. Dunning
Mary J. Woodhead
WATKISS, DUNNING & WATKISS
111 East Broadway, #800
Salt Lake City, Utah 84111-2304

Elizabeth King

EXHIBIT A

ELIZABETH T. DUNNING (3896)
MARY J. WOODHEAD (5581)
WATKISS DUNNING & WATKISS
Broadway Centre, Suite 800
111 East Broadway
Salt Lake City, Utah 84111-2304
Telephone: (801) 530-1500

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAN L. TYLER, Plaintiff, vs. DEPARTMENT OF HUMAN SERVICES, NORMAN G. ANGUS, and CHARLES F. LARSEN, Defendants.	:	**ORDER** Civil No. 920901254CV Judge Richard H. Moffat

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This matter came on for hearing before the Court on March 23, 1993 on the Motion of plaintiff Jan L. Tyler ("Tyler") to Compel responses to Plaintiff's Second Request for Production of Documents and Tyler's Motion to Amend. Tyler was represented by Elizabeth T. Dunning and Mary J. Woodhead. Defendants Department of Human Services, Norman

G. Angus and Charles F. Larsen were represented by John P. Soltis, Barbara H. Ochoa and Carol L. C. Verdoia.

At the outset of the hearing counsel for defendants stipulated to permit Tyler's filing her Amended Complaint which adds Tyler's breach of contract claim.

Having reviewed the memoranda of the parties in support of and in opposition to Tyler's Motion to Compel, having heard the arguments of counsel and being fully advised in this matter, the Court finds that with rare exception, discovery in litigated matters is governed by the rules of discovery and evidence and not by the provisions of the Government Records Access and Management Act. The Court further finds that no parts of the requested discovery are subject to any exclusionary rule or privilege at this point in the proceedings. Therefore,

IT IS HEREBY ORDERED,

That Tyler's Motion to Compel responses to Tyler's Second Request for Production of Documents is GRANTED.

DATED this 16th day of July, 1993.

BY THE COURT:

DISTRICT JUDGE RICHARD H. MOR[illegible]

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

EXHIBIT B

9-2-

JAN GRAHAM (1321)
Attorney General
ELIZABETH KING (4863)
Assistant Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1650

Attorneys for Defendant/Appellant

IN THE UTAH SUPREME COURT

JAN L. TYLER,	:	
Plaintiff and Appellee,	:	**DOCKETING STATEMENT**
v.	:	**Subject to Assignment to the Court of Appeals**
DEPARTMENT OF HUMAN SERVICES, NORMAN G. ANGUS, and CHARLES F. LARSEN,	:	Civil No. _____
Defendants and Appellants.	:	

Defendants/Appellants, the State of Utah, Utah Department of Human Services, Norman G. Angus and Charles F. Larsen, submit the following docketing statement pursuant to Rule 9, Utah Rules of Appellate Procedure.

1. **Date of Entry of Judgment or Order Appealed From:** July 16, 1993.

2. **Nature of Post Judgment Motion(s) and Date(s) Filed:** Defendants' Memoranda in Support of Defendants' Motion for Clarification and Reconsideration dated June 22, 1993, and July 13, 1993.

3. **Date and Effect of Order(s) Disposing of Post Judgment Motion(s) and Order of Determination of Final Judgment**

Under Utah R. Civ. P. 54(b): Order Denying Defendants' Motion for Clarification and Reconsideration dated July 16, 1993, and Minute Entry dated July 20, 1993; there is no Order of Final Judgment.

4. **Date of Filing of Notice of Appeal:** August 13, 1993.

5. **Jurisdiction:** The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(j)(1992) and the Collateral Order Doctrine.

6. **Name of Trial Court or Agency:** Third Judicial District Court, Salt Lake County, the Honorable Richard H. Moffat presiding.

7. **Statement of Facts:** This action involves a claim by plaintiff that she was transferred from her employment with the Department of Human Services in violation of Utah Code Ann. § 67-21-3 (the Whistle Blower Claim); that her transfer violated 42 U.S.C. § 2000e-5 (the Title VII Claim); and includes a breach of contract claim.

In February, 1993, plaintiff brought a motion to compel discovery requesting that the trial court hold that the Government Records Access and Management Act (GRAMA) does not apply to civil discovery. After lengthy briefing, Judge Moffat agreed with plaintiff's interpretation of the law and held that "discovery in litigated matters is governed by the Rules of Discovery and Evidence and not by the provisions of the Government Records and Management Act." (Order dated July 16, 1993.) The Court further found that "no parts of the requested

discovery are subject to any exclusionary rule or privilege." (Id.)

8. **Issues for Review and Standard of Review:**

A. Whether GRAMA is applicable to civil discovery.

(1). How to reconcile the conflicting provisions of GRAMA in cases involving the State as a litigant.

(2). If GRAMA does not apply in civil discovery, which aspects of the statutory language and of the Utah Rules of Civil Procedure apply to limit discovery in this case; i.e., (a) privilege of confidentiality; (b) relevancy threshold.

(3). Whether defendants are entitled to an in-camera examination of documents in this case to determine whether plaintiff's interest in disclosure outweighs the State's interest in confidentiality.

B. Whether the district court had subject matter jurisdiction to hear plaintiff's Whistle Blower Claim in contradiction of Utah Code Ann. § 67-21-3 (1989).

These are questions of law; therefore, this Court must review the decision below for correctness, according it no deference. Ledfors v. Emery County School Dist., 849 P.2d 1162, 1162-63 (Utah 1993).

9. **Determination of Case by Supreme Court:** This case involves questions of first impression regarding the interpretation of the Utah Government Records Access and

Management Act (GRAMA), Utah Code Ann. §§ 63-2-101, et seq., specifically the 1992 amendment encoded in § 63-2-207, Utah Code Ann. and the Whistle Blower claim encoded in §§ 67-21-1, et. seq. Consequently, the Utah Supreme Court should retain jurisdiction and decide this case.

10. **Determinative Law:**

Statutes: Utah Code Ann. §§ 63-2-101, et seq.; Utah Code Ann. § 63-2-202, Utah Code Ann. § 63-2-204, Utah Code Ann. § 63-2-205; § 63-2-207, § 63-2-201(5)(a) and (b); §§ 67-21-1, et. seq.; and Utah Code § 78-24-8.

Rules: Rule 26, Utah Rules of Civil Procedure.

Cases: Durfey v. School Board of Education of Wayne County School District, 604 P.2d 480 (Utah 1979); State Road Commission v. Petty, 412 P.2d 914 (Utah 1966); Meyers v. Salt Lake City Corp., 747 P.2d 1058 (Utah Ct. App. 1987); Madsen v. United Television, Inc., 801 P.2d 912 (Utah 1990); and Glasman v. Second District Court, 80 Utah 1, 7, 12 P.2d 361, 363 (1932) (cited with favor in State v. Perank, 191 Utah Adv. Rep. 5 (1992)).

11. Related Appeals: There are no prior or related appeals.

RESPECTFULLY SUBMITTED this 2d day of September, 1993.

JAN GRAHAM
Attorney General

Elizabeth King

ELIZABETH KING
Assistant Attorney General
Attorney for Defendant/Appellant